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IN THE

Supreme Court of the United States

Kimberly J. Goodin,

Petitioner,

v.

United States Postal Inspection Service.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Mark D. Kelly
KLEMP & STANTON, P.L.L.P.
400 Exchange Building
26 East Exchange St.
St. Paul, MN 55101

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Amy Howe
(Counsel of Record)
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl. NW
Washington, DC 20016
(202) 237-7543

Thomas C. Goldstein
AKIN, GUMP, STRAUSS, HAUER
& FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036

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QUESTION PRESENTED

Whether the Contract Disputes Act of 1978, 41 U.S.C. 601 et seq., impliedly repeals the independent grant of jurisdiction in statutes providing that governmental entities may sue or be sued in federal district court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kimberly J. Goodin respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Eighth Circuit (Pet. App. 1a-6a) is published at 444 F.3d 998. The district court's decision (Pet. App. 7a-14a) is published at 393 F. Supp. 2d 869.

JURISDICTION

The court of appeals issued its decision on April 19, 2006. On July 5, 2006, Justice Alito extended the time to file this petition to and including August 17, 2006. App. 06A10. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

39 U.S.C. 401(1), enacted as part of the Postal Reorganization Act (PRA) of 1970, provides in relevant part:

> The Postal Service shall have the following general powers: (1) to sue and be sued in its official name.

39 U.S.C. 409(a), enacted as part of the Postal Reorganization Act, provides in relevant part:

> Except as provided in section 3628 of this title, the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service. Any action brought in a State court to which the Postal Service is a party may be removed to the appropriate United States district court under the provisions of chapter 89 of title 28.

Section 2 of the Contract Disputes Act (CDA) of 1978, 41 U.S.C. 601(2), provides in relevant part:

> As used in this Act—the term "executive agency" means * * * the United States Postal Service."

Section 3 of the CDA, 41 U.S.C. 602(a), provides in relevant part:

> Unless otherwise specifically provided herein, this Act applies to any express or implied contract * * * entered into by an executive agency for—
>
> (1) the procurement of property, other than real property in being;
>
> (2) the procurement of services;
>
> (3) the procurement of construction, alteration, repair or maintenance of real property; or,
>
> (4) the disposal of personal property.

Section 10 of the CDA, 41 U.S.C. 609(a)(1), provides in relevant part:

> [I]n lieu of appealing the decision of the contracting officer under section 6 to an agency board, a contractor may bring an action directly on the claim in the United States Claims Court [United States Court of Federal Claims], notwithstanding any contract provision, regulation, or rule of law to the contrary.

The Little Tucker Act, as amended by the CDA, 28 U.S.C. 1346(a), provides in relevant part:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of: * * *
>
> > Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded * * * upon any express or implied contract with the United States * * * except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States * * * which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978.

STATEMENT

1. The Postal Reorganization Act (PRA) of 1970, 39 U.S.C. 409(a), provides district courts with "original but not exclusive jurisdiction over all actions brought by or against the Postal Service." Without mentioning this provision, the Contract Disputes Act (CDA) of 1978, 41 U.S.C. 601 et seq., establishes an administrative mechanism for raising contract disputes with federal agencies (including the Postal Service) generally and provides a means of judicial review of such claims in the United States Court of Federal Claims. The question in this case is whether the CDA impliedly repealed the pre-existing independent grant of jurisdiction to the district courts over contract disputes with the Postal Service.

1. In December 2001, petitioner Kimberly Goodin ("petitioner") read an article in a local Coon Rapids, Minnesota newspaper regarding a string of recent armed robberies in the area, including an assault on a postal worker. Pet. App. 2a. The article – which included a sketch of the suspect – reported that respondent U.S. Postal Inspection Service was offering a reward of up to $50,000 "for information leading to the arrest and conviction of the suspect." *Ibid.*; *id.* 8a.

Petitioner contacted the local police department and identified the suspect, who was arrested and charged and subsequently pled guilty. Pet. App. 2a. Petitioner then applied for the reward offered by respondent. She never received any payment, however. *Ibid.*[1]

2. Petitioner subsequently initiated this suit in the U.S. District Court for the District of Minnesota, alleging – inter

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[1] Respondent contended (and petitioner denied) that petitioner's application lacked a mandatory personal history form and photograph. See Pet. App. 2a. However, that dispute is not at issue here.

alia – that respondent had breached its contract with her.[2] She contended that jurisdiction in that court was appropriate pursuant to the Postal Reorganization Act, 39 U.S.C. 101 et seq., which provides both that the Postal Service may "sue and be sued in its official name," *id.* § 401(1), and that federal district courts "shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service," *id.* § 409(a).

Respondent moved to dismiss petitioner's claim, alleging that the district court lacked subject matter jurisdiction and that the case instead must be filed in the United States Court of Federal Claims. In support, respondent relied on the Contract Disputes Act of 1978, 41 U.S.C. 601-13. That statute – which applies to specified "express or implied contract[s] entered into by an executive agency," *id.* § 602(a), including the Postal Service, see *id.* § 601(2) – outlines a set of procedures by which a government contractor may challenge government contracting decisions. As relevant here, a contractor may appeal the decision of a contracting officer either to an agency board of contract appeals, see *id.* § 606, or – "notwithstanding any contract provision, regulation, or rule of law to the contrary" – directly to the United States Court of Federal Claims, see *id.* § 609.

The district court dismissed the case, agreeing with respondent that the CDA divested it of subject matter jurisdiction over petitioner's breach-of-contract claim.[3] Pet. App. 14a. The court reasoned that the "plain language of the CDA" "provides that the Federal Court of Claims has jurisdiction over 'any * * * implied contract * * * entered into

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[2] Respondent U.S. Postal Inspection Service is a division of the U.S. Postal Service. See http://www.usps.com/postalinspectors/missmore.htm (visited Aug. 14, 2006).

[3] The district court also dismissed petitioner's fraudulent misrepresentation claim (which is not at issue here) for lack of subject matter jurisdiction. See Pet. App. 10a.

by an executive agency for . . . the procurement of services,'" and that petitioner's claim was such an implied contract. *Ibid.*

3. On appeal, the Eighth Circuit affirmed. It rejected petitioner's claim that the PRA provides an independent basis for district court jurisdiction over her breach-of-contract claim. The court of appeals acknowledged that the Ninth Circuit would allow petitioner's claim to proceed but rejected that circuit's rule. Pet. App. 5a (citing *In re Liberty Construction*, 9 F.3d 800 (1993)). Instead, it followed decisions of the Sixth and District of Columbia Circuits holding that a "precisely drawn, detailed statute" such as the CDA preempted other statutory provisions – similar to those in the PRA – that provided an independent basis for district court jurisdiction. See *id.* 4a-5a (citing *Campanella* v. *Commerce Exchange Bank*, 137 F.3d 885 (CA6 1998); *A&S Council Oil Co., Inc.* v. *Lader*, 56 F.3d 234 (CADC 1995)). Both of those courts, the Eighth Circuit explained, "emphasized that if Congress had intended sue and be sued clauses to enable parties to escape the exclusive jurisdiction provided by the CDA and sue in federal district court, it would not have needed to specify in 41 U.S.C. § 602(b) that disputes over some contracts formed by the Tennessee Valley Authority (which has a sue and be sued clause) are exempted from the CDA." *Ibid.* The court concluded that deeming the Court of Federal Claims jurisdiction to be exclusive is "consistent with the CDA's purpose of 'centralizing the process of contract-dispute resolution and thus making it more efficient,'" particularly insofar as the CDA is "intended 'both to limit the waiver of sovereign immunity and to submit government contract issues to forums that have specialized knowledge and experience.'" *Id.* 5a-6a (quoting *Campanella*, 137 F.3d at 890; *United States* v. *Kasler Elec. Co.*, 123 F.3d 341, 346 (CA6 1997)).

4. This petition followed.

REASONS FOR GRANTING THE WRIT

This case presents an important question of federal law on which the circuits are avowedly intractably divided. In several statutes, Congress has conferred on federal district courts jurisdiction over suits against certain quasi-governmental agencies, subjecting them to suit in federal district courts as if they were private corporations. More recently, Congress enacted the Contract Disputes Act, which extends to quasi-governmental entities such as the Postal Service but is directed principally at contract disputes with traditional federal agencies. There is a longstanding, widely recognized, and deeply entrenched conflict among seven circuits regarding whether the Contract Disputes Act impliedly repealed the independent grants of jurisdiction for suits against these quasi-governmental entities, vesting jurisdiction over claims such as petitioner's exclusively in the Court of Federal Claims. Five courts of appeals – including the Eighth Circuit in this case – have construed the CDA to divest district courts of jurisdiction over matters within the Act's purview. Two other circuits reject that interpretation, holding instead that the CDA is merely a non-exclusive grant of federal jurisdiction that does not preclude district court jurisdiction over a contract covered by the CDA when there is an independent basis for that jurisdiction.

I. The Question Presented Is the Subject of an Irreconcilable Circuit Conflict.

1. The circuit conflict over whether the CDA divests district courts of jurisdiction over matters within the Act's purview has been widely recognized. In *Licata* v. *United States Postal Service*, 33 F.3d 259 (CA3 1994), for example, the Third Circuit noted that "[t]wo circuits, after careful consideration, have held that where there is an independent basis for district court jurisdiction (as there is for claims against the Postal Service), both the Contract Disputes Act and the Tucker Act are irrelevant," *id.* at 264 (citing *In re*

Liberty Const., 9 F.3d 800 (CA9 1993), and *Marine Coatings of Alabama, Inc.* v. *United States*, 932 F.2d 1370, 1377 (CA11 1991)). On the other hand, the Third Circuit observed, other courts have concluded that the CDA repealed all other pre-existing grants of original jurisdiction over contract claims subject to the CDA. 33 F.3d at 264 n.6 (citing, *e.g.*, *Hayes* v. *United States Postal Service*, 859 F.2d 354, 356 (CA5 1988)).[4]

The Ninth and Eleventh Circuits interpret the CDA as a non-exclusive grant of federal jurisdiction and on that basis permit plaintiffs to file suit in federal district court (rather than in the Court of Federal Claims) when there is an alternative, independent basis for district court jurisdiction. In *Wright* v. *United States Postal Service*, 29 F.3d 1426, 1428 (CA9 1994), the Ninth Circuit held that the CDA does not preempt federal district courts' historic jurisdiction under the Postal Reorganization Act. The court began by noting that, as a general matter, "[w]hen Congress establishes * * * an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied" (quoting *Franchise Tax Bd.* v. *United States Postal Service*, 467 U.S. 512, 517-18 (1984)) (second alteration in original). Turning to the specific question whether the CDA supersedes the PRA's independent grant of district court jurisdiction, the court deemed its prior decision in *In re Liberty Construction*, 9 F.3d 800 (1993), dispositive. 29 F.3d at 1430. That case involved a claim brought by a contractor against the Small Business Administration under the "sue and be sued" provision of the Small Business Act, 15 U.S.C. 634(b)(1).[5] The district court

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[4] The Third Circuit itself ultimately did not decide the question in *Licata*. 33 F.3d at 264 n.6.

[5] The statute provides, in relevant part, that the Administrator of the SBA may "sue and be sued * * * in any United States District Court, and jurisdiction is conferred upon such District

dismissed for lack of subject matter jurisdiction, but the Ninth Circuit reversed. In holding that the contractor's claim could proceed in the district court, the court of appeals relied on its prior precedent holding that jurisdiction under the Tucker Act – which vested jurisdiction over contract claims against the government in the Court of Claims – "is not exclusive where other statutes independently confer jurisdiction and waive sovereign immunity." 9 F.3d at 801 (quoting *Munoz* v. *Small Business Admin.*, 644 F.2d 1361, 1364 (CA9 1981)). The court rejected the government's argument that the CDA had subsequently divested district courts of jurisdiction over all contract claims within its scope, explaining that although the CDA "withdrew district court jurisdiction under the Tucker Act over contract claims for damages not exceeding $10,000," it "otherwise left existing jurisdiction intact." *Ibid.* In *Wright*, the court found no basis for distinguishing between the jurisdictional grant for the SBA and the Postal Service. 29 F.3d at 1430.[6] Accordingly, "[a]pplying *Liberty Construction* and the Supreme Court's admonition that the PRA's waiver of immunity be 'liberally construed,'" the Ninth Circuit concluded that the CDA does not preempt either contractor or subcontractor actions against the USPS when there is an independent basis for jurisdiction over such actions. *Ibid.* (quoting *Franchise Tax Bd.*, 467 U.S. at 517).

The Eleventh Circuit similarly holds that the CDA does not foreclose reliance on other statutes conferring jurisdiction on the federal district courts. In *Marine Coatings of Alabama, Inc.* v. *United States*, 932 F.2d 1370, 1377 (1991),

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Court to determine controversies without regard to the amount involved in the controversy."

[6] In its Eighth Circuit brief in this case, respondent similarly acknowledged that, for purposes of the CDA, the reasoning of courts applying the majority rule to claims under the SBA is "fully applicable" to claims under the PRA, as nothing in those cases "turned on the particular wording of the sue-or-be-sued clause at issue." Resp. C.A. Br. 15.

the court of appeals rejected the government's argument that the CDA superseded provisions of the Maritime Lien Act, which – when read together with the Suits in Admiralty Act and the Public Vessels Act – provided for district court jurisdiction over the plaintiff's claim. The court of appeals found "no reasonable justification" for allowing the CDA to narrow the scope of the sovereign immunity waiver provided by the SAA and PVA; to the contrary, the court reasoned, to "impose external limits on an express waiver of sovereign immunity" such as those of the SAA and PVA "would frustrate Congress's purpose in enacting the provisions." *Ibid.* Thus, the court of appeals concluded, although the CDA provided a waiver of sovereign immunity, "there is no need to apply [it] if another method of bringing suit is available." *Ibid.*

In contrast to the holdings of the Ninth and Eleventh Circuits, the Eighth Circuit in this case and four other courts of appeals hold that the CDA categorically strips district courts of jurisdiction over all claims falling under its purview, even when there would otherwise be an independent basis for district court jurisdiction. See Pet. App. 5a-6a; *A&S Council Oil Co.* v. *Lader*, 56 F.3d 234, 241-42 (CADC 1995); *Campanella* v. *Commerce Exchange Bank*, 137 F.3d 885, 890-91 (CA6 1998); *United States of America* v. *J & E Salvage Co.*, 55 F.3d 985, 987 (CA4 1995); *Hayes* v. *United States Postal Service*, 859 F.2d 354 (CA5 1988). Cf. *Up State Federal Credit Union* v. *Walker*, 198 F.3d 372, 373 (CA2 1999) (per curiam) (suggesting that court's agreement).

The split is sufficiently broad that judges within the same district have adopted conflicting positions. Compare *Sharon Hill Chester Pike, L.P.* v. *United States Postal Service*, 886 F. Supp. 487 (E.D. Pa. 1995) (holding that CDA does not preclude district court jurisdiction under the PRA) with *Fortna, Inc.* v. *United States Postal Service*, No. 00-3081, 2000 U.S. Dist. LEXIS 19179 (E.D. Pa. Jan. 2, 2001) (following majority rule); *Eagle Fence Co.* v. *V.S. Electric, Inc.*, 324 F. Supp. 2d 621 (E.D. Pa. 2004) (same).

2. Certiorari is also warranted because the circuit split is entrenched. The split has existed at least since 1995, see *A&S Council Oil Co.*, 56 F.3d at 241 (CADC) (holding that CDA vested Court of Federal Claims with exclusive jurisdiction over claims within Act's purview) with *In re Liberty Construction*, 9 F.3d at 801 (CA9) (CDA does not divest district courts of jurisdiction when there is an independent basis for jurisdiction), and is only growing more entrenched with time, as courts of appeals – including the Eighth Circuit in this case – acknowledge the divergent rules of circuits such as the Ninth but nonetheless follow the majority rule. See, *e.g.*, Pet. App. 5a; *Campanella*, 137 F.3d at 891.

Nor would there be any benefit to permitting the question presented to percolate further in the lower courts. To the contrary, the issues have been sufficiently well ventilated that many courts considering the question presented for the first time no longer engage in any independent analysis, opting instead to merely acknowledge the divergent holdings of the courts of appeals and then follow the courts on a particular side of the circuit split. Their view is that "[n]othing would be gained by spilling more ink here." *Twin Cities Air Service* v. *United States Postal Service*, 195 F. Supp. 2d 242, 243 (D. Me. 2002). See also, *e.g.*, *Eagle Fence Co.*, 324 F. Supp. 2d at 626; *Fortna, Inc.*, 2000 U.S. Dist. LEXIS 19179, at *3.

3. This circuit split is untenable because the question presented arises with respect to several statutory schemes. In addition to the Postal Service and the Small Business Administration, Congress has enacted similar sue-and-be-sued clauses and independent bases for jurisdiction with regard to other executive agencies. See, *e.g.*, 29 U.S.C. 1302(b) (Pension Benefit Guaranty Corporation); 12 U.S.C. 635(a)(1) (Export-Import Bank).

These quasi-governmental entities, like any ordinary large corporation, routinely enter into countless commercial and other contracts, predictably giving rise to contract disputes and, therefore, the jurisdictional question presented

by this petition.[7] The result of the conflict moreover is that in some circuits private parties to these contracts may choose to litigate their contract claims in either federal district courts or the Court of Federal Claims, while in other circuits similarly situated parties may bring such claims only in the Court of Federal Claims. Indeed, the combination of the unsettled nature of the law and the CDA's exhaustion requirements can lead to particularly harsh consequences, as courts in several cases have determined that the plaintiffs' claims fell within the scope of the CDA and then dismissed the cases, rather than transferring them to the Court of Federal Claims, on the ground that the plaintiff "failed to exhaust the jurisdictional remedies required for relief under the CDA." See, *e.g.*, *A&S Council*, 56 F.3d at 242; *1-10 Industry Associates, Inc.*, 133 F. Supp. 2d 194, 197 (E.D.N.Y. 2001) (same).

4. Finally, this case is an ideal vehicle to consider the question presented, which was squarely raised to, and directly addressed by, the Eighth Circuit. Moreover, because petitioner's breach-of-contract claim is her only remaining claim, see Pet. App. 3a, the question presented is outcome determinative in her case.

II. The CDA Does Not Divest District Courts of Jurisdiction When There Is an Independent Basis for Jurisdiction.

Certiorari is also warranted because the Eighth Circuit's holding that the CDA provides the exclusive remedial scheme for government contract claims falling within its scope is incorrect.

1. There is no question that the sole source of federal court jurisdiction over most contract disputes with ordinary federal agencies is the Tucker Act, as amended by the

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[7] The Postal Service alone serves over 7.5 million customers daily at more than 37,000 Post Offices nationwide. U.S. Postal Service, *Postal Facts 2006*, http://www.usps.com/communications/organization/postalfacts.htm.

Contract Disputes Act of 1978 (CDA). Congress has, however, seen fit to address separately suits against certain quasi-governmental entities, such as the Postal Service and the Small Business Administration. In keeping with Congress's general determination that such entities should be treated more like ordinary corporations than like federal agencies, Congress waived their sovereign immunity from contract suits and expressly subjected them to the jurisdiction of the federal district courts. See 39 U.S.C. 409(a). The PRA thus provides federal district courts with "original but not exclusive jurisdiction over all actions brought by or against the Postal Service." *Ibid.* Nothing in the text of the CDA expressly repeals that grant of jurisdiction. This Court has "'repeatedly stated * * * that absent a clearly established congressional intention, repeals by implication are not favored. An implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute.'" *Lockhart* v. *United States*, 126 S. Ct. 699, 704 (2005) (citation omitted); see also *Ruckleshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016-19 (1984) (declining to find implied partial repeal of Tucker Act jurisdiction). Nothing in the language of the CDA satisfies that standard. To the contrary, the text of the CDA indicates that the Act was merely intended to provide a non-exclusive avenue to federal court jurisdiction.

First, Congress's failure to repeal Section 409(a) of the PRA plainly was not an oversight, as the CDA *did* expressly address the question of federal court jurisdiction, but merely undertook a much more limited revision of the law. As the Ninth Circuit noted in *In re Liberty Construction*, 9 F.3d 800, 801 (1993), Congress in the CDA specifically withdrew one discrete independent grant of district court jurisdiction by amending the Little Tucker Act to divest district courts of their concurrent jurisdiction over contract claims not exceeding $10,000. The fact that Congress expressly withdrew one grant of district court jurisdiction undermines

any claim that it simultaneously withdrew another grant *sub silentio*. To the contrary, by leaving undisturbed the separate jurisdictional provisions of the PRA and similar statutes, Congress plainly intended a different treatment for quasi-governmental agencies such as the Postal Service. That these entities were previously subject to separate legislative treatment – including the creation of separate special jurisdictional provisions – underscores the unlikelihood that Congress's special treatment of those entities under the CDA was accidental.

Indeed, when Congress has intended to create a comprehensive remedial scheme that supersedes *all* other jurisdictional grants or remedies, it has done so with explicit statutory language. For example, in the Federal Tort Claims Act, Congress clearly identified the circumstances in which remedies provided by that act would be exclusive. See, *e.g.*, 28 U.S.C. 2679(a) ("The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive."). See also, *e.g.*, 46 U.S.C. Appx. 745 (providing that in particular admiralty suits, "where a remedy is provided by this Act, it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States"); 33 U.S.C. 905(a) (providing for exclusive employer liability in covered longshoremen cases).[8]

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[8] To be sure, the CDA does provide that a contracting officer's decision "shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter." See 41 U.S.C. 605(b). Despite this provision and others in the CDA, courts following the majority rule have nonetheless explained that "it might still be the case that * * * sue-and-be-sued clause[s] permitted review of contract disputes outside the CDA framework,"

Although courts applying the majority rule place considerable weight on the fact that certain TVA contracts are excluded from the CDA, see, *e.g.*, *A&S Council*, 56 F.3d at 242 (citing 41 U.S.C. 602(b)), such an exclusion does not lead inexorably to the conclusion that the CDA otherwise establishes an exclusive remedial scheme for all claims falling within its scope. To the contrary, although the Tucker Act also excludes claims relating to the TVA from the jurisdiction of the Court of Federal Claims, see 28 U.S.C. 1491(c) ("Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction * * * of any action against, or founded on conduct of, the Tennessee Valley Authority * * *."), this Court has held that the Tucker Act does not provide an exclusive avenue to federal court jurisdiction. See *Bowen* v. *Massachusetts*, 487 U.S. 879, 910 n.48 (1988) (explaining that although it "is often assumed that the Claims Court has exclusive jurisdiction of Tucker Act claims for more than $10,000," in fact "that court's jurisdiction is 'exclusive' only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court").

2. The CDA's legislative history is similarly devoid of any expression of congressional intent to supplant all of the preexisting remedies available to persons such as petitioner. To the contrary, the legislative history of the CDA indicates that it was in fact enacted to provide government contractors with *expanded* access to judicial review and to streamline the dispute resolution process. See, *e.g.*, S. Rep. No. 95-1118, reprinted in 1978 U.S.C.C.A.N. (92 Stat.) 5235, 5249; see also Lauren Springer, *Choice of Forum From a Contractor's Perspective*, 37 AM. U.L. REV. 1237, 1241 (1988); Samuel J. Rob, *Contractor Assertion of Claims Under the Contracts*

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and their reasoning has instead hinged on the specific carve-out for some claims against the TVA. See, *e.g.*, *A&S Council*, 56 F.3d at 242. However, as explained *infra*, the reliance on the TVA exemption is inapposite.

Disputes Act, 133 MIL. L. REV. 141, 142 (1991). Specifically, in the decades prior to the enactment of the CDA, contractors who wished to appeal a contracting officer's decision did not have direct access to the Court of Claims, but were instead required to proceed first to the agency's board of contract appeals; only after the board had ruled on the contractors' claims could they then appeal to the Court of Claims. See Springer, *supra*, at 1238-39. The CDA was thus intended merely to expand the rights of government contractors, providing them with the option of direct access to the Court of Claims in cases in which they otherwise lacked an independent basis for federal court jurisdiction.[9] It certainly was not intended to restrict the rights of persons such as petitioner, who already had an independent basis for district court jurisdiction over their claims.

3. Giving effect to the unrepealed jurisdictional provisions of the PRA is not incompatible with the general purposes animating the CDA. Congress has provided alternative sources of jurisdiction for only a handful of special quasi-governmental agencies outside of the framework of the CDA. The vast majority of contract disputes with federal executive agencies generally are governed solely by the jurisdictional regime of the CDA. The special nature of quasi-

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[9] Effective January 6, 2007, the Contract Disputes Act has been amended as it applies to the Postal Service. The effect of the amendment is apparently to expressly authorize appeals from contracting officers not only directly to the Court of Federal Claims but also alternatively to the Postal Service Board of Contract Appeals and then to the Federal Circuit, and also to delete the Postal Service from the definition of executive agency. See Pub. L. No. 109-163, Div. A, Title VIII, Subtitle E, § 847(d)(1)(A) & (d)(2)(B), 119 Stat. 3393. Although the precise effect of the amendment is unclear, it does not affect the question presented as it relates to the Postal Service and petitioner's case, but in any event has no effect on the question presented with regard to other claims against executive agencies for which there is an independent basis for district court jurisdiction.

governmental agencies like the Postal Service, however, has led Congress to single those entities out for special statutory treatment. The separate jurisdictional provision of the PRA was part of Congress's effort to ensure that the Postal Service would be "run more like a business," leading this Court to "presume that the [Postal Service's] liability is the same as that of any other business." *Franchise Tax Bd.* v. *United States Postal Service*, 467 U.S. 512, 519-20 (1984). Of course, contract disputes with "any other business" are conducted in the federal district courts, rather than the Court of Federal Claims.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Mark D. Kelly
KLEMP & STANTON, P.L.L.P.
400 Exchange Building
26 East Exchange St.
St. Paul, MN 55101

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Amy Howe
(Counsel of Record)
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl. NW
Washington, DC 20016
(202) 237-7543

Thomas C. Goldstein
AKIN, GUMP, STRAUSS, HAUER
& FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036

August 17, 2006

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 05-2388

KIMBERLY J. GOODIN,
PLAINTIFF-APPELLANT,

v.

UNITED STATES POSTAL INSPECTION SERVICE,
DEFENDANT-APPELLEE.

March 15, 2006, Submitted
April 19, 2006, Filed

Appeal from the United States District Court
For the District of Minnesota

COUNSEL: For KIMBERLY J. GOODIN, Plaintiff-Appellant: Mark D. Kelly, St. Paul, MN.

For UNITED STATES POSTAL INSPECTION SERVICE, Defendant-Appellee: Patricia R. Cangemi, U.S. ATTORNEY'S OFFICE, Minneapolis, MN; Barbara C. Biddle, U.S. DEPARTMENT OF JUSTICE, Civil Rights Division, Appellate Section, Washington, DC; I. Glenn Cohen, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

Before MURPHY, BOWMAN, and BENTON, Circuit Judges.

OPINION: MURPHY, Circuit Judge.

This action was brought by Kimberly J. Goodin complaining that the United States Postal Inspection Service (Postal

Service) failed to grant her a reward it had offered for information leading to the arrest and conviction of an armed robber who had assaulted a postal worker. The district court [1] concluded that her claim should be brought in the Court of Federal Claims and dismissed the case for lack of jurisdiction. Goodin appeals, and we affirm.

A local newspaper reported on a string of armed robberies, one of which involved an assault on a postal worker while he was delivering mail to a Hallmark store. It provided a sketch of the robber on December 7, 2001 and reported that the Postal Service was offering a reward of up to $ 50,000 "for information leading to the arrest and conviction of the suspect." Goodin talked with Andrew Lien about the article, and both thought they recognized the suspect. Goodin then contacted the police department on December 8 and identified the suspect as Nathan Graves; Lien responded to the reward offer on December 9. Graves was subsequently arrested and charged, and Goodin was subpoenaed to testify at his trial but Graves pled guilty. Both Goodin and Lien submitted applications for the reward, and Lien was paid $5,000 for "information" according to the reward receipt. Goodin did not receive any payment, however. The Postal Service contends that her application was incomplete because it lacked a required personal history form and photograph which Goodin denies.

Goodin sued the Postal Service in the federal district court alleging fraudulent misrepresentation and breach of contract. The Postal Service moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and in the alternative for summary judgment. The district court dismissed the claim for fraudulent misrepresentation, noting

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[1] The Honorable Joan N. Ericksen, United States District Judge for the District of Minnesota.

that tort claims must be brought against the United States rather than a federal agency and that the government could not be sued for fraudulent misrepresentation even under the Federal Tort Claims Act. See 28 U.S.C. § 2680(h). It dismissed the breach of contract claim for lack of subject matter jurisdiction, because under the Contract Disputes Act (CDA) recovery against the United States on an implied contract for services can only be sought before an agency board or in the Court of Federal Claims. See 41 U.S.C. §§ 602(a), 609(a)(1).

On her appeal Goodin challenges only the dismissal of her breach of contract claim, asserting that the district court had jurisdiction under the "sue and be sued clause" of the Postal Reorganization Act of 1970, see 39 U.S.C. § 401, and that the offer by the Postal Service was not for the procurement of services and is consequently not subject to the CDA. Goodin argues in the alternative that the Postal Service consented to jurisdiction or is equitably estopped from asserting a lack of jurisdiction because it never provided a written decision concerning her claim and failed to inform her to proceed in the Court of Federal Claims, in violation of 28 U.S.C. § 1491(a)(1) and 41 U.S.C. §§ 601-06.

The Postal Service counters that the Postal Reorganization Act's sue and be sued clause is preempted by the exclusive and comprehensive remedial scheme in the CDA, which provides for judicial review only in the Court of Federal Claims. See 41 U.S.C. § 609(a). The Service also argues that Goodin has waived her argument that the offer does not come under the CDA by not providing sufficient analysis to support it, and she has not explained why a contract for the provision of information would not be a contract for the provision of services subject to the CDA. Her estoppel argument is without merit because officers of the United States cannot waive its sovereign immunity and jurisdiction cannot be established by estoppel. Finally, the government argues that this case can be decided on the alternative ground that no

contract was ever formed because the reward offer specified an amount "up to $ 50,000," no minimum was guaranteed, and the offer was not a promise. *See Cornejo-Ortega v. United States*, 61 Fed. Cl. 371, 375 (Fed. Cl. 2004).

We review de novo a dismissal for lack of subject matter jurisdiction. See *Godfrey v. Pulitzer Pub. Co.*, 161 F.3d 1137, 1140 (8th Cir. 1998). The CDA specifically encompasses claims based on contracts for the procurement of services entered into by an executive agency, including the United States Postal Service. See 41 U.S.C. §§ 601(2), 602. The CDA provides a "comprehensive statutory system of remedies for resolving government contract disputes," *United States v. McDonnell Douglas*, 751 F.2d 220, 223 (8th Cir. 1984), and it offers two opportunities for review of an adverse determination by a contracting officer. A contractor may either appeal the decision to an agency board of contract appeals or may seek judicial review in the Court of Federal Claims. See 41 U.S.C. §§ 606, 609(a)(1). Federal district courts are divested of jurisdiction over claims "founded upon any express or implied contract with the United States" that fall within the CDA. See 28 U.S.C. § 1346(a)(2).

Goodin's assertion that the sue and be sued provision of the Postal Reorganization Act supplied a valid basis for district court jurisdiction fails because a "precisely drawn, detailed statute preempts more general remedies." *Brown v. General Serv's Admin.*, 425 U.S. 820, 96 S. Ct. 1961, 48 L. Ed. 2d 402 (1976). The CDA has been recognized to have such an effect in respect to other statutes. Both the Sixth Circuit and the District of Columbia have held, for example, that a claim falling within the coverage of the CDA cannot be removed from that statute's framework through the Small Business Administration's sue and be sued clause. *See, e.g., Campanella v. Commerce Exch. Bank*, 137 F.3d 885 (6th Cir. 1998), *A&S Council Oil Co., Inc. v. Lader*, 312 U.S. App. D.C. 270, 56 F.3d 234 (D.C. Cir. 1995). Both courts emphasized that if Congress had intended sue and be sued

clauses to enable parties to escape the exclusive jurisdiction provided by the CDA and sue in federal district court, it would not have needed to specify in 41 U.S.C. § 602(b) that disputes over some contracts formed by the Tennessee Valley Authority (which has a sue and be sued clause) are exempted from the CDA. *Campanella*, 137 F.3d at 891; *A&S Council*, 56 F.3d at 242.

Goodin's reliance on *LaStrada Inn, Inc. v. United States*, 12 Cl. Ct. 110 (Cl. Ct. 1987), and *Busby School of Northern Cheyenne Tribe v. United States*, 8 Cl. Ct. 596 (Cl. Ct. 1985) is misplaced; she is asserting neither a fair dealing claim as in *LaStrada* nor a claim similar to the grant-like contract between the tribally elected school board and the Bureau of Indian Affairs in *Busby*.[2] Goodin also relies on *In re Liberty Constr.*, 9 F.3d 800 (9th Cir. 1993), a Ninth Circuit decision permitting an action involving the Small Business Administration (SBA) to go forward in the district court but interpreting the CDA restrictively in a manner that has been characterized as "devoid of analysis." *See Campanella*, 137 F.3d at 891. In contrast, the Fifth Circuit held in a somewhat analogous case to this one that a contract action against the Postal Service arising from an employee suggestion program had to be brought in the Court of Claims. *See Hayes v. United States Postal Service*, 859 F.2d 354 (5th Cir. 1988). See also *Campanella*, 137 F.3d at 891, *A&S Council*, 56 F.3d at 241-42. Such exclusive jurisdiction is consistent with the CDA's purpose of "centralizing the process of contract-dispute resolution and thus making it more efficient," *Campanella*, 137 F.3d at 890; it is intended "both to limit the waiver of sovereign immunity and to submit government contract issues to forums that have specialized knowledge and

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[2] The Indian Self-Determination and Education Assistance Act has since been amended to specify that the CDA generally does not apply to contracts involving Indian self determination. *See* 25 U.S.C. § 450m-1.

experience." *United States v. Kasler Elec. Co.*, 123 F.3d 341, 346 (6th Cir. 1997) (also quoted in *Campanella*, 137 F.3d at 890).

Goodin's attempt to exempt herself from the reach of the CDA by characterizing her actions as forming a contract for information rather than for services is similarly unpersuasive. We agree with the district court that there is no basis for concluding that the term services does not include the provision of information, particularly in light of the federal regulation on postal awards which authorizes rewards based on the "significance of services rendered, character of the offender, risks and hazards involved, time spent, and expenses incurred." *See* 39 C.F.R. § 233.2, General Provision 2 (emphasis added).

Goodin alleges that no denial letter was issued in response to her claim, but any failure to issue a timely denial letter is deemed by the statute to be a denial, see 41 U.S.C. § 605(c)(5), which permitted Goodin to pursue the comprehensive remedies available under the CDA. Failure to issue a denial letter cannot create jurisdiction by waiver or estoppel. *See, e.g., United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 660, 67 S. Ct. 601, 91 L. Ed. 577, 108 Ct. Cl. 763 (1947) (only Congress can waive immunity), *Hercules Inc. v. United States*, 516 U.S. 417, 430, 116 S. Ct. 981, 134 L. Ed. 2d 47 (1996) (jurisdiction cannot be established through equitable considerations alone). Since we conclude that there was no jurisdiction even if a contract was formed, we do not need to reach the government's argument that no contract was ever formed.

Since the relief sought by Goodin is to recover on a contract, her claim must be brought in the Court of Federal Claims under the statutory scheme created by Congress. *See A&S Council*, 56 F.3d at 241. Because we agree that the district court did not have jurisdiction to consider Goodin's claim, we affirm.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

Civ. No. 03-4915 (JNE/JGL)

KIMBERLY J. GOODIN,
PLAINTIFF,

v.

UNITED STATES POSTAL INSPECTION SERVICE,
DEFENDANT.

March 31, 2005, Decided

COUNSEL: Mark D. Kelly, Esq., Klemp & Stanton, P.L.L.P., on brief for Plaintiff Kimberly J. Goodin.

Patricia R. Cangemi, Esq., United States Attorney's Office for the District of Minnesota, on brief for Defendant United States Postal Inspection Service.

ORDER

This is an action brought by Kimberly J. Goodin against the United States Postal Inspection Service (USPIS) for fraudulent misrepresentation and breach of contract. The case is before the Court on USPIS's motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) or in the alternative for summary judgment,[1] and Goodin's motion to amend her Complaint. For the reasons set forth below, the

[1] USPIS, however, does not offer arguments in support of its motion for summary judgment and does not rely on matters outside of the pleadings. Accordingly, the Court considers USPIS's motion only under the framework of Rule 12.

Court grants in part and denies in part USPIS's motion and denies Goodin's motion.

I. BACKGROUND

On December 7, 2001, the Coon Rapids Herald reported a string of recent robberies and published a sketch of the man suspected of committing the robberies. The article mentioned that because one of the robberies involved an assault on a postal worker, USPIS was offering a reward of up to $50,000 for information. After seeing the article on December 8, 2001, Goodin called the Coon Rapids Police Department that same day to provide information regarding the probable identity of the suspect. The suspect identified by Goodin later pled guilty to the robberies. Goodin claims that USPIS has refused to pay her any portion of the reward. On August 12, 2003, Goodin brought this action alleging claims of breach of contract and fraudulent misrepresentation.

II. DISCUSSION

To properly dismiss an action for lack of subject matter jurisdiction, the challenging party must successfully attack the complaint, either upon its face or upon the factual truthfulness of its averments. *See Osborn v. United States*, 918 F.2d 724, 729-30 (8th Cir. 1990) (discussing the standards to be employed in determining a 12(b)(1) motion). "The burden of proving subject matter rests on [the plaintiff]." *Hoekel v. Plumbing Planning Corp.*, 20 F.3d 839, 840 (8th Cir. 1994).

In ruling on a motion to dismiss a complaint for failure to state a claim upon which relief can be granted, a court must accept the complaint's factual allegations as true and construe them in the light most favorable to the plaintiff. *Midwestern Mach., Inc. v. Northwest Airlines, Inc.*, 167 F.3d 439, 441 (8th Cir. 1999); *Davis v. Hall*, 992 F.2d 151, 152 (8th Cir. 1993). The court will not dismiss the complaint unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); *Schaller Tel. Co. v. Golden Sky Sys., Inc.*, 298 F.3d 736, 740 (8th Cir. 2002).

A. Fraudulent misrepresentation

The Court first turns to Goodin's claim for fraudulent misrepresentation. USPIS asserts that pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (2000) (FTCA), and 28 U.S.C. § 1346(b), this Court lacks subject matter jurisdiction over Goodin's claim for fraudulent misrepresentation. The Court agrees. With regard to tort claims, the FTCA provides that a federal agency, regardless of its authority to sue or be sued, may not be sued in its own name. 28 U.S.C. § 2679(a). Instead, tort claims must be brought against the United States. *Id.* at §§ 1346(b), 2679(a). Here, fraudulent misrepresentation is a tort, and pursuant to 39 U.S.C. § 409, USPIS is a federal agency for purposes of the FTCA. Consequently, Goodin's claim against USPIS fails as a matter of law. Moreover, fraudulent misrepresentation is expressly exempted under the FTCA. 28 U.S.C. § 2680(h) (exempting "any claim arising out of ... misrepresentation [or] deceit"); *see United States v. Neustadt*, 366 U.S. 696, 699, 6 L. Ed. 2d 614, 81 S. Ct. 1294 (1962) (citing with approval the Second Circuit Court of Appeal's conclusion in *Jones v. United States*, 207 F.2d 563, 564 (2d Cir. 1953) that deceit, as used in § 2680(h), is equivalent to fraudulent misrepresentation). Thus, even if Goodin had properly named the United States as a defendant, Goodin's claim fails as a matter of law.

Nevertheless, in response to USPIS's motion, Goodin filed an untimely motion to amend her Complaint to add the United States as a defendant.[2] As discussed above, the

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[2] Chief Magistrate Judge Lebedoff's December 1, 2003 pretrial scheduling Order set February 1, 2004 as the deadline for amending the pleadings or adding parties. Goodin filed her motion to amend seven months later, on September 2, 2004.

addition of the United States to her Complaint would be futile, and the Court therefore denies Goodin's motion.[3] *See Hammer v. City of Osage Beach, Mo.*, 318 F.3d 832, 844 (8th Cir. 2003) (holding that leave to amend should be freely granted pursuant to Fed. R. Civ. P. 15(a) unless compelling reasons exist "such as ... futility of the amendment"); *United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, 269 F.3d 932, 936 (8th Cir. 2001) (noting that a court may deny a motion for leave to amend based on futility when the amended complaint fails to state a claim).

Accordingly, Goodin's claim for fraudulent misrepresentation fails – both for lack of subject matter jurisdiction with respect to USPIS and for failure to state a claim upon which relief can be granted with respect to the United States. The Court therefore grants USPIS's motion to dismiss with respect to Goodin's fraudulent misrepresentation claim.

B. Breach of contract

Next, USPIS contends that Goodin's breach of contract claim fails as a matter of law because the USPIS regulations authorizing the issuance of rewards prohibit the creation of contractual obligations based on the submission of information in response to a reward offer. Specifically, USPIS relies on 39 C.F.R. § 233.2(c) (2000), which provides: "The decision as to whether a reward shall be paid and the amount thereof shall be solely within the discretion of the Chief Postal Inspector or his delegate and the submission of

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[3] In addition to futility, the Court notes that there are sufficient alternate grounds to deny the motion to amend, including: Goodin's failure to direct the Court to any argument or reason in support of her motion; her delay of more than one year in moving to amend; the fact that discovery had been closed for several months; and the fact that USPIS had already filed its motion to dismiss based on her Complaint. *Cf. Hammer*, 318 F.3d at 844-45.

information or a claim for a reward shall not establish a contractual right to receive any award." According to USPIS, Goodin's contract claim fails because there could be no contract formation under this regulation.

In response, Goodin argues that USPIS misreads the regulation. Goodin contends that § 233.2(c) only applies to rewards offered in cases of fraud, not assault. Goodin asserts that instead, § 233.2(b) is the only provision relevant to an assault on a postal worker and it neither vests total discretion in the Postal Inspector nor prohibits the formation of contractual obligations.

The Court agrees with Goodin. Section 233.2(c) addresses information relating to "the detection of persons or firms who obtain, or seek to obtain, funds, property or services from the Postal Service based upon false or fraudulent activities, statements or claims." Here, the conduct underlying the issuance of the reward offer was an assault on a postal worker while he was delivering the mail. Accordingly, § 233.2(b)(1)(vii), which provides that "rewards will be paid up to the amounts and under the conditions stated in Poster 296, Notice of Reward, for the arrest and conviction persons for ... (vii) Assault on postal employee" applies. Although § 233.2(b), General Provision 2, provides some discretion in the distribution of rewards, it does not provide the clear barrier to the formation of a contractual obligation relied upon by USPIS. Because this is the sole ground upon which USPIS bases its motion, the Court denies USPIS's motion to dismiss for failure to state a claim upon which relief can be granted.

Next, USPIS moves to dismiss Goodin's contract claim based on lack of subject matter jurisdiction. Assuming for the sake of this motion the existence of a contract, USPIS contends that this Court lacks subject matter jurisdiction pursuant to 28 U.S.C. §§ 1346(a)(2), 1491 and the Contract Dispute Act of 1978, 41 U.S.C. §§ 601-613 (2000) (CDA) because the contract at issue is one for the procurement of

services. In response, Goodin asserts that this Court has jurisdiction under the Postal Reorganization Act, 39 U.S.C. §§ 101-5605 (2000) (PRA), and further argues that the contract at issue is one for information, not services.

The parties agree that the PRA waived sovereign immunity for the USPIS by including a "sue and be sued" clause which allowed USPIS to be sued in federal district courts. 39 U.S.C. § 401(1). In contrast, to provide a comprehensive system of remedies for resolving government contract disputes, Congress enacted the CDA and thereby divested district courts of jurisdiction in matters under its purview. *See United States v. McDonnell Douglas Corp.*, 751 F.2d 220, 223 (8th Cir. 1984); 28 U.S.C. § 1346(a)(2). As such, claims involving certain government contracts must be brought in the Federal Court of Claims. 28 U.S.C. § 1346(a)(2). The CDA applies "to any express or implied contract. . . entered into by an executive agency for ... the procurement of services." 41 U.S.C. § 602(a). The USPIS is expressly included as an "executive agency" covered by the CDA. *Id.* § 601(2).

Thus, the determinative question before the Court is whether the implied contract at issue here is one for the procurement of "services." USPIS argues that this must be considered a contract for services. In support, USPIS relies on 39 C.F.R. § 233.2(b) General Provision 2, which provides that "the amount of any reward will be based on the significance of the services rendered." 39 C.F.R. § 233.2(b), gen. prov. 2 (emphasis added). To the contrary, Goodin contends that her providing information does not constitute a "service." In support, she relies on a reward receipt received by Andrew Lien, another informant, from USPIS. The receipt stated that the payment was "for information." However, Goodin fails to explain why a contract for the provision of information, specifically the identification of a suspect, does not constitute a service as delineated by § 233.2(b). If Goodin intends her argument to be that her purported contract with USPIS was a

contract for "goods" and not for "services," then her argument is misplaced. *See* Blacks Law Dictionary 714 (8th ed. 2004) (defining goods as "tangible or movable personal property other than money"); see also U.C.C. § 2-105(1) (1977) ("'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid . . . ."). Given this, the Court concludes that this implied contract for the submission of information constitutes a contract for "services."

Nonetheless, the Court recognizes that there is some dispute over whether the CDA is intended to apply to the contract, if it is a contract, at issue here. Both Goodin and USPIS address this concern by citing to inapposite case law. For her part, Goodin directs the Court to *La Strada Inn, Inc., v. United States*, 12 Cl. Ct. 110 (1987). In that case, the Federal Court of Claims (f/k/a United States Claims Court) held that a plaintiff's claim for lost profits based on an implied contract of fair dealing that arose upon the submission of a prospective contractor's bid with the government, was outside the purview of the CDA. *La Strada*, 12 Cl. Ct. at 114-15. Based on established precedent, the court reasoned that because an implied contract of fair dealing operates to define the way that the government must deal with the bidding process, it was not a contract for services. *Id.* at 115. Here, Goodin did not plead a claim for implied contract of fair dealing, but rather claims that an implied unilateral contract was formed when she responded to the reward offer.

USPIS cites to a number of cases that do not specifically support its position. For example, in *Hayes v. United States Postal Service*, 859 F.2d 354 (5th Cir. 1988), the Fifth Circuit Court of Appeals affirmed the district court's conclusion that it lacked jurisdiction under the CDA for an employee's claim for implied breach of contract against the Postal Service for its failure to pay for services rendered in using an employee suggestion box. 859 F.2d at 355-56. Upon review of the case,

the Court of Claims disagreed. *See Hayes v. United States Postal Serv.*, 20 Cl. Ct. 150 (1990). The Court of Claims first noted the absence of an independent statutory basis for the employee suggestion program and then reasoned that because the dispute stemmed from Hayes' status as an employee of the Postal Service, the PRA, not the CDA governed. *Id.* at 154-55.

The plain language of the CDA provides that the Federal Court of Claims has jurisdiction over "any express or implied contract . . . entered into by an executive agency for . . . the procurement of services." 41 U.S.C. § 602(a). In the absence of persuasive authority demonstrating that it has jurisdiction, the Court declines to depart from the statute. The Court therefore concludes that Goodin's claim against USPIS is subject to the CDA because her claim: (1) is founded upon an implied contract with an executive agency within the purview of 41 U.S.C. § 601(2) and 28 U.S.C. § 1346 (a)(2); and (2) constitutes a contract for the procurement of services. Accordingly, the Court grants USPIS's motion to dismiss for lack of subject matter jurisdiction.

III. CONCLUSION

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. USPIS's motion to dismiss [Docket No. 19] is GRANTED IN PART and DENIED IN PART.
2. Goodin's motion to amend her Complaint [Docket No. 28] is DENIED.
3. Goodin's Complaint [Docket No. 1] is DISMISSED. LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 31, 2005

JOAN N. ERICKSEN
United States District Judge

FILED
NOV 24 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-260

In the Supreme Court of the United States

KIMBERLY J. GOODIN, PETITIONER

v.

UNITED STATES POSTAL INSPECTION SERVICE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
BARBARA C. BIDDLE
KELSI BROWN CORKRAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, which limits direct judicial review of certain government contract disputes to the Court of Federal Claims, precludes district court jurisdiction over such claims under the Postal Reorganization Act's sue-and-be-sued clause, 39 U.S.C. 401(1), 409(a).

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UNITED STATES POSTAL INSPECTION SERVICE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 444 F.3d 998. The opinion of the district court (Pet. App. 7a-14a) is reported at 393 F. Supp. 2d 869.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 2006. On July 5, 2006, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including August 17, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. On November 27, 2001, Michael Walter Schwartzbauer, a letter carrier for the United States Postal Ser-

vice, interrupted an armed robbery while delivering mail to a Hallmark store in Blaine, Minnesota. On December 7, 2001, a local newspaper reported a string of recent robberies and published a sketch of the man suspected of committing the robberies. The same article mentioned that because one of the robberies involved an assault on a postal worker, the United States Postal Inspection Service (USPIS) was offering a reward of "up to $50,000" for information leading to the arrest and conviction of the perpetrator. Gov't C.A. App. 7; Pet. C.A. App. 1-2, 8.

On December 8, 2001, petitioner called the local police department to report that she and her boyfriend saw the composite sketch in the newspaper and believed the suspect was Nathan Graves. According to a statement petitioner provided to the police two days later, petitioner learned of the newspaper article from a friend, Andrew Lien, who had told her he believed the sketch to be of Graves. On December 9, 2001, Lien telephoned the police department and provided specific information as to potential locations where Graves might be found and stated that Graves might be driving a green Jaguar. Lien also indicated his interest in the reward money. Gov't C.A. App. 8; Pet. C.A. App. 9-11, 55-57.

Graves was arrested and charged with four counts of aggravated robbery and one count of assault. He eventually pleaded guilty to one count of simple robbery and two counts of aggravated robbery, but he neither pleaded guilty nor was convicted of the charges arising from the November 27, 2002, robbery of the Hallmark store. Gov't C.A. App. 8-9; Pet. C.A. App. 60, 70-71.

On March 12, 2002, Postal Inspector Thomas R. Rucke wrote the police department a letter which noted his understanding that Lien was the informant responsi-

ble for identifying Graves and instructed that Lien should complete the enclosed Personal History Form and submit it with a personal photograph attached. The letter also stated that if there was another source of information, then that individual also had to come forward, complete the Personal History Form, and submit the form with a photograph. Gov't C.A. App. 9; Pet. C.A. App. 93-94.

On August 5, 2002, the police department submitted a recommendation for reward, listing both Lien and petitioner as potential claimants. Only Lien, however, submitted the Application for Reward accompanied by the required Personal History Form and photograph. Petitioner submitted an Application for Reward on August 8, 2002, but failed to include the required Personal History Form and photograph. On December 17, 2002, USPIS paid $5000 to Lien for the information he provided regarding Graves. Gov't C.A. App. 9-10; Pet. C.A. App. 97, 98-104, 149-150.

2. Petitioner brought suit against USPIS in the United States District Court for the District of Minnesota alleging, *inter alia*, breach of contract. On March 31, 2005, the district court dismissed the action for lack of subject matter jurisdiction, holding that petitioner's contract claim fell under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 *et seq.*, which limits direct judicial review to the Court of Federal Claims. The district court explained that although the Postal Reorganization Act (PRA) contains a sue-and-be-sued clause that allows the United States Postal Service to be sued in its own name in federal district court, see 39 U.S.C. 401(1), 409(a), that clause is preempted by the "plain language of the CDA," which provides a "comprehensive system of remedies for resolving government contract disputes"

and "divest[s] district courts of jurisdiction in matters under its purview." Pet. App. 12a, 14a. In support of its holding, the district court noted that the CDA applies to express or implied contracts "entered into by an executive agency" and expressly identifies the United States Postal Service as an "executive agency" covered by the statute. *Id.* at 12a.

3. The court of appeals affirmed. Pet. App. 1a-6a. Applying the established rule that a "precisely drawn, detailed statute pre-empts more general remedies," *id.* at 4a (quoting *Brown* v. *GSA*, 425 U.S. 820, 834 (1976)), the court of appeals explained that the plain language of the CDA, which expressly divests district courts of jurisdiction over government contract disputes, must be read as preempting the more general jurisdictional grant contained in the PRA's sue-and-be-sued clause. The court recognized that the Ninth Circuit had held otherwise in an earlier case "devoid of analysis" of the issue, *id.* at 5a (quoting *Campanella* v. *Commerce Exch. Bank*, 137 F.3d 885, 891 (6th Cir. 1998)), but chose to join the Fifth, Sixth, and D.C. Circuits in concluding that Congress could not have intended for sue-and-be-sued clauses like the one in the PRA "to enable parties to escape the exclusive jurisdiction provided by the CDA," *id.* at 4a-5a.

ARGUMENT

The decision below is correct, and is consistent with the decisions of the Fifth, Sixth, and D.C. Circuits, each of which has also held that the CDA precludes district court jurisdiction over contract claims within its scope, notwithstanding the existence of a general sue-and-be-sued clause. Although the Ninth Circuit has held to the contrary, this Court's review is not warranted. The

Ninth Circuit's reasoning was cursory at best, and that court has not had occasion to revisit the question since the other courts of appeals have addressed it and explained why the CDA precludes district court jurisdiction. Moreover, the question presented has little continuing importance in light of recent amendments to the CDA, and this case is not a good vehicle for such review in any event. Accordingly, the petition for a writ of certiorari should be denied.

1. The court of appeals applied settled principles of statutory interpretation in determining that the CDA displaces the PRA's general sue-and-be-sued clause. This case falls squarely under the well-established rule that "a precisely drawn, detailed statute preempts more general remedies." *Brown* v. *GSA*, 425 U.S. 820, 834 (1976). Under the jurisdictional scheme set out by Congress in the CDA, "[a]ll claims by a contractor against the government relating to a contract" covered by the Act must be submitted first to the contracting officer. 41 U.S.C. 605(a). If a claimant wishes to appeal a contracting officer's decision, the CDA authorizes her to seek either (1) administrative review in the appropriate agency board of contract appeals, or (2) judicial review directly in the Court of Federal Claims. 41 U.S.C. 606, 609(a)(1) and (3). With the exception of those two avenues for review, "[t]he contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency." 41 U.S.C. 605(b). In other words, the CDA lays out a specific process for resolving disputes over certain government contracts and expressly limits direct judicial review of such disputes to the Court of Federal Claims.

Petitioner does not argue before this Court that her contract claim falls outside the scope of those provisions.

Rather, petitioner argues that she may nonetheless bring suit in federal district court because the PRA provides that the Postal Service may "sue and be sued" in district court. 39 U.S.C. 401(1), 409(a). As the D.C. Circuit has observed, however, the CDA is "the paradigm of a 'precisely drawn, detailed statute' that preempts more general jurisdictional provisions," including a general sue-and-be-sued clause. *A&S Council Oil Co.* v. *Lader*, 56 F.3d 234, 241 (D.C. Cir. 1995) (quoting *Brown*, 425 U.S. at 834).[1]

Although petitioner asserts that no "irreconcilable conflict" exists between the CDA's detailed remedial scheme and the general jurisdictional grant of the PRA, Pet. 12 (quoting *Lockhart* v. *United States*, 126 S. Ct. 699, 704 (2005) (Scalia, J., concurring)), the language of the CDA expressly precludes direct judicial review of covered contract disputes by any court other than the Court of Federal Claims. 41 U.S.C. 605(b) ("The contracting officer's decision on the claim shall be final and

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[1] While petitioner claims that this result is contrary to the CDA's legislative purpose, see Pet. 14-15 (asserting that the CDA "was in fact enacted to provide government contractors with *expanded* access to judicial review"), numerous courts have concluded that Congress enacted the CDA in order to "centraliz[e] the process of contract-dispute resolution" by limiting judicial review of government contract disputes to a specific forum with unique expertise, *i.e.*, the Court of Federal Claims. *Campanella* v. *Commerce Exch. Bank*, 137 F.3d 885, 890 (6th Cir. 1998); see, *e.g.*, *Quality Tooling, Inc.* v. *United States*, 47 F.3d 1569, 1580 (Fed. Cir. 1995) (referring to "the interest expressed by the CDA in resolving government contract claims in familiar, and expert, fora"); *Ingersoll-Rand Co.* v. *United States*, 780 F.2d 74, 78 (D.C. Cir. 1985) (explaining that government contract issues "are within the unique expertise of the Court of Claims" and that "we must implement the congressional intent to provide a single, uniquely qualified forum for the resolution of contractual disputes").

conclusive and *not subject to review by any forum, tribunal, or Government agency*, unless * * * authorized by this chapter.") (emphasis added). To allow district court review of such claims under the PRA's sue-and-be-sued clause would directly contradict the CDA's explicit mandate that its remedial scheme be both final and exclusive.

Moreover, the CDA expressly identifies the Postal Service as an executive agency within its purview. 41 U.S.C. 601(2). This provision would have little meaning if, as petitioner argues, the PRA's jurisdictional grant extends to all contract claims against the Postal Service regardless of whether the CDA prohibits such judicial review, because claimants could always avoid the CDA's jurisdictional restrictions by filing suit under the PRA. In addition, although the Tennessee Valley Authority (TVA) Act of 1933 includes a sue-and-be-sued clause identical to that in the PRA, see 16 U.S.C. 831c(b), the CDA explicitly exempts certain TVA contract claims from its scope, 41 U.S.C. 602(b). As the D.C. Circuit has noted, this exemption "would have been wholly unnecessary unless Congress assumed that a sue-and-be-sued clause would not trump the CDA's exclusivity provisions." *A & S Council*, 56 F.3d at 242.

2. The circuit conflict asserted by petitioner does not warrant this Court's review. Consistent with the reasoning above, the Fifth, Sixth, Eighth, and D.C. Circuits have all concluded that a general sue-and-be-sued clause cannot provide a basis for district court jurisdiction over contract disputes that must be brought in the Court of Federal Claims under the CDA. See Pet. App. 4a-5a; *Hayes* v. *USPS*, 859 F.2d 354, 356 (5th Cir. 1988); *Campanella*, 137 F.3d at 890-891; *A & S Council*, 56 F.3d at 241-242. The Fourth Circuit has held more

broadly that federal district courts lack jurisdiction over any contract claim covered by the CDA's remedial scheme. See *United States* v. *J & E Salvage Co.*, 55 F.3d 985, 987 (4th Cir. 1995).

Only one federal court of appeals—the Ninth Circuit—has adopted a different position.[2] But as the Sixth Circuit explained, the Ninth Circuit's decision, *In re Liberty Construction*, 9 F.3d 800, 802 (1993), is "devoid of analysis" and fails to justify the result reached. *Campanella*, 137 F.3d at 891. The Ninth Circuit based its holding on its pre-CDA precedent holding that the Tucker Act did not preclude concurrent jurisdiction in district courts under the Small Business Act's sue-and-be-sued clause. *Liberty Constr.*, 9 F.3d at 801-802. The correct question, however, focuses not on the Tucker Act, but on whether in passing the CDA Congress created an exclusive remedial scheme, which is the only vehicle through which a plaintiff can seek a remedy.

Neither the Ninth Circuit nor any court outside the Ninth Circuit has applied *Liberty Construction* in the years since the D.C. Circuit issued its thorough analysis in *A & S Council*, 56 F.3d at 241-242, which explains in detail why well-established rules of statutory interpretation require the conclusion that the CDA's remedial scheme preempts district court jurisdiction granted by a sue-and-be-sued clause. Although petitioner characterizes the circuit split as "growing more entrenched with time, as [more] courts * * * follow the majority

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[2] Petitioner cites *Marine Coatings of Alabama, Inc.* v. *United States*, 932 F.2d 1370 (11th Cir. 1991) for the proposition that the Eleventh Circuit has also taken a position on the issue presented here. Pet. 8-9. That decision, however, addressed only the CDA's impact on the Suits in Admiralty Act and Public Vessels Act, which are structured quite differently than the PRA.

rule" of the D.C. Circuit, Pet. 10, the split is entirely one-sided, and it is certainly possible that if the Ninth Circuit is presented with the issue again, it will recognize the strength of the legal argument that the CDA's remedies are exclusive and the great weight of judicial authority rejecting its position, and reconsider its position, dissolving the conflict altogether.

In addition, any holding by this Court regarding the CDA's impact on petitioner's contract claim against the Postal Service would have very limited future relevance, because Congress recently amended the CDA as it applies to the Postal Service. Effective January 6, 2007, the amendment deletes the Postal Service from the definition of executive agencies subject to the CDA and expressly authorizes contractors to appeal adverse decisions by Postal Service contracting officers to either the Court of Federal Claims or alternatively to the Postal Service Board of Contract Appeals and then to the Federal Circuit. See Act of Jan. 6, 2006, Pub. L. No. 109-163, Div. A, Tit. VIII, Subtit. E, § 847(d)(1)(A), (d)(2)(B) and (g), 119 Stat. 3393, 3395. Accordingly, the question presented—*i.e.*, whether the CDA's pre-2007 jurisdictional provisions preclude district court jurisdiction over contract disputes with the Postal Service under the PRA's sue-and-be-sued clause—is of no continuing importance. Although petitioner responds that the amendment "has no effect on the question presented with regard to other claims against executive agencies," Pet. 15 n.9, the impact of the CDA's jurisdictional provisions on suits brought against other agencies under different statutes should be determined in a case involving one of those statutes.

3. In any event, review should be denied because this case is an inappropriate vehicle for addressing the

question presented, because the facts petitioner alleges demonstrate that no contract existed in the first place. Under basic principles of contract law, USPIS's offer to reward "up to $50,000" for information leading to an arrest cannot constitute an implied-in-fact-contract. As the Court of Federal Claims explained in a similar case:

> [T]he fact remains that the poster only offered a reward "up to" $2.2 million. The quoted phrase has been construed to include zero as its lower limit. See *Application of Mochel*, 470 F.2d 638, 640 (C.C.P.A.1972); *Arness v. Franks*, 31 C.C.P.A. 737, 138 F.2d 213, 216 (1943); *see also Public Service Comm'n of Md. v. City of Annapolis*, 71 Md. App. 593, 526 A.2d 975, 981 (1987) ("the statement of a maximum does not imply the existence of a minimum"). Words such as this give rise only to an illusory promise, or more accurately, no promise at all.

Cornejo-Ortega v. *United States*, 61 Fed. Cl. 371, 375 (2004). As the Restatement (Second) on Contracts explains:

> Words of promise which by their terms make performance entirely optional with the "promisor" whatever may happen, or whatever course of conduct in other respects he may pursue, do not constitute a promise. Although such words are often referred to as forming an illusory promise, they do not fall within the present definition of promise. They may not even manifest any intention on the part of the promisor.

Restatement (Second) of Contracts § 2, cmt. e (1981); see *United States* v. *Winstar Corp.*, 518 U.S. 839, 921 (1996) (Scalia J., concurring).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

BARBARA C. BIDDLE
KELSI BROWN CORKRAN
Attorneys

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IN THE

Supreme Court of the United States

Kimberly J. Goodin,

Petitioner,

v.

United States Postal Inspection Service.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

Mark D. Kelly
KLEMP & STANTON, P.L.L.P
400 East Exchange St.
St. Paul, MN 55101

Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Amy Howe
(Counsel of Record)
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl. NW
Washington, DC 20016
(202) 237-7543

Thomas C. Goldstein
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire Ave. NW
Washington, DC 20036

December 5, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

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REPLY BRIEF FOR THE PETITIONER

The Eighth Circuit held in this case that the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 601 et seq., impliedly repeals the independent grant of jurisdiction in statutes – such as the Postal Reorganization Act (PRA) – providing that governmental entities may sue or be sued in federal district court. Although the Solicitor General expressly acknowledges that the courts of appeals are divided on this important question, he contends that certiorari is nonetheless not warranted. However, each of his arguments against certiorari falls short. First, the circuit split is entrenched: the Solicitor General offers neither a reason to believe that the Ninth Circuit might "reconsider" its position nor any genuine explanation why the Eleventh Circuit's decision in *Marine Coatings of Alabama, Inc. v. United States*, 932 F.2d 1370 (1991), does not place it squarely on the same side of the split as the Ninth Circuit. Second, the recent technical amendments to the CDA do nothing to diminish the importance of the question presented, as the amendments have no substantive effect on the operation of the CDA with respect to the Postal Service or other government agencies. Third, the rule adopted by the Ninth and Eleventh Circuits is fully consistent with Congress's purpose in enacting both the CDA and the PRA. By contrast, reading into the CDA an implied repeal of the PRA's "sue and be sued" provision, passed just a few years before, is untenable given the CDA's purpose of *expanding*, rather than *limiting*, federal contractors' access to courts. Fourth, and finally, the Solicitor General's contention that petitioner's underlying contract claim is "illusory" is irrelevant to the question whether certiorari is warranted; indeed, the Solicitor General does not contend that this Court would even reach this issue on the merits. Certiorari should accordingly be granted.

1. The Solicitor General's assertion that certiorari is not warranted because the Ninth Circuit might "reconsider its position" (BIO 9) in light of the D.C. Circuit's holding in *A & S*

Council Oil Co. v. Lader, 56 F.3d 234 (1995), amounts to nothing more than unwarranted speculation.

First, the position of the Ninth Circuit is both more settled and more thoroughly reasoned than the Solicitor General contends. In *In re Liberty Construction*, 9 F.3d 800 (1993), the Ninth Circuit identified and answered the precise question the Solicitor General alleges it ignored: namely, "whether in passing the CDA Congress created an exclusive remedial scheme" (BIO 8). The government argued in that case, as it does here, that the court should "broadly interpret [the CDA] as withdrawing all district court jurisdiction over contract claims within the scope of the CDA, regardless of independent statutory grants of jurisdiction." *Liberty Construction*, 9 F.3d at 801. But the court squarely rejected such a broad construction. Instead, it held that its earlier determination that "the SBA's 'sue and be sued' provision vested jurisdiction in the district court over claims against the SBA" remained "the law of the Ninth Circuit after the enactment of the CDA and its amendment of the Tucker Act." *Id.*

In so holding, the Ninth Circuit relied in part on its earlier precedent, *North Side Lumber Co. v. Block*, 753 F.2d 1482 (1985), which in turn concluded from a close reading of the text of 28 U.S.C. § 1346(a)(2) that the CDA merely amended the jurisdictional grant of the Tucker Act and was not a general bar to contract suits in district courts. *Id.* at 1486. While the limitation in Section 1346(a)(2) uses the phrase "*any* civil action or claim" (emphasis in original), it does so only in reference to the specific jurisdictional grant of the Tucker Act – that is, over contract disputes "not exceeding $10,000." *Id.* Thus, the bar only precludes contractors from bringing "any civil action or claim" in district court for disputes "not exceeding $10,000."

In *Wright v. U.S. Postal Service*, 29 F.3d 1426, 1428-30 (1994), a case that the Solicitor General does not address at all, the Ninth Circuit subsequently reaffirmed its holdings in *Liberty Construction* and *North Side Lumber* and applied

them to the "virtually identical" "sue and be sued" jurisdictional grant in the PRA. The Ninth Circuit in *Wright* again rejected what it regarded as the "legally-incorrect premise that the CDA provides the exclusive basis for litigation of claims relating to government contracts." *Id.* at 1428. Instead, it relied on "*Liberty Construction* and the Supreme Court's admonition that the PRA's waiver of immunity be 'liberally construed' [to] hold that the CDA does not preempt" contract claims against the Postal Service. *Id.* at 1430 (quoting *Franchise Tax Bd. v. U.S. Postal Service*, 467 U.S. 512, 517 (1984)).

Second, there is no reason to believe that the Ninth Circuit will reconsider its position in light of the D.C. Circuit's decision in *A & S Council*. *Contra* BIO 8-9. To the contrary, in the years since *A & S Council*, courts in the Ninth Circuit have favorably cited that court's holding in *Liberty Construction* at least three times in published opinions. *See Kim v. Kang*, 154 F.3d 996, 999 (9th Cir. 1998); *Jet Investment, Inc. v. Department of Army*, 84 F.3d 1137, 1143 n.12 (9th Cir. 1996); *Southwest Marine, Inc. v. United States*, 926 F. Supp. 142, 146 (N.D. Cal. 1995); *see also Cadillac Fairview/California, Inc. v. Dow Chemical Co.*, Nos. 83-7996 & 83-8034, 1997 U.S. Dist. LEXIS 3083, at *42 (C.D. Cal. Feb. 19, 1997).

2. Even the slim prospect of the Ninth Circuit reversing itself en banc is rendered irrelevant by the fact that the circuit split would persist as a result of the Eleventh Circuit's holding in *Marine Coatings of Alabama, Inc. v. United States*, 932 F.2d 1370 (11th Cir. 1991). The Solicitor General's perfunctory contention that "the Eleventh Circuit has [not] taken a position on" the question presented because the statutory scheme at issue in that case was "structured quite differently than the PRA" (BIO 8 n.2) is unavailing. The Solicitor General offers no explanation why the "structure" of the Suits in Admiralty Act (SAA), 46 U.S.C. §§ 741-52, and the Public Vessels Act (PVA), 46 U.S.C. §§ 781-90, which provided the

basis for the district court jurisdiction in *Marine Coatings*, should matter at all. And indeed, it does not, as the relevant issue in *Marine Coatings* is instead the operation of the CDA and whether it "impose[s] external limits" on independent grants of jurisdiction, 932 F.2d at 1377 – viz., precisely the issue presented in this case. Significantly, the Eleventh Circuit's holding in *Marine Coatings* rests not on the precision with which Congress established district court jurisdiction under the SAA and PVA, but instead on a reluctance to read the CDA as impliedly repealing a grant of jurisdiction when to do so would "frustrate Congress's purpose" in granting that jurisdiction in the first place. *Id.*

The Solicitor General's arguments for reading the CDA to imply such a repeal of the PRA would apply equally to the SAA and PVA. That the Eleventh Circuit held that "there is no need to apply [the CDA] if another method of bringing suit is available," *id.*, leaves little doubt that it would follow the Ninth Circuit in holding that the CDA does not preclude a contract claim under a statute such as the PRA. Indeed, numerous other courts have construed *Marine Coatings* not as a case limited to the SAA and the PVA, but instead as standing – like the Ninth Circuit's decisions in *Liberty Construction* and *Wright* – for the general proposition that "the CDA does not preempt district court jurisdiction over governmental contract cases provided that the plaintiff asserts a jurisdictional ground independent of the CDA." *Pike v. U.S. Postal Service*, 886 F. Supp. 487, 489 (E.D. Pa. 1995); *see also Licata v. U.S. Postal Service*, 33 F.3d 259, 264 n.6 (3d Cir. 1994); *Eagle Fence Co. v. V.S. Electric, Inc.*, 324 F. Supp. 2d 621, 625-26 (E.D. Pa. 2004); *Dardar v. Potter*, No. 02-3802, 2004 U.S. Dist. LEXIS 3512, at *43 n.79 (E.D. La. Mar. 4, 2004); *Twin Cities Air Service, Inc. v. U.S. Postal Service*, 195 F. Supp. 2d 242, 242 (D. Me. 2002).

3. Contrary to respondent's contention (BIO 9), the January 6, 2006 amendments to the CDA have no effect on the continuing importance of the question whether the CDA

precludes the grant of district court jurisdiction under the PRA or any other independent grant of jurisdiction. Rather, taken together, the amendments merely implement Congress's decision to consolidate the majority of the various agency contract boards of appeals into a single "Civilian Board of Contract Appeals." Act of Jan. 6, 2006, Pub. L. No. 109-163, § 847, 119 Stat. 3391.

First, although the amendments delete the Postal Service from the CDA's definition of "executive agency," *see id.* § 847(d)(1)(A), that change is purely a technical one. The Act does not exempt the Postal Service from the purview of the CDA; rather, it creates a "Postal Service Board of Contract Appeals" (separate from the new Civilian Board of Contract Appeals) with "jurisdiction to decide any appeal from a decision of a contracting officer of the United States Postal Service," and makes clear that the CDA is to "apply to contract disputes before the Postal Service Board of Contract Appeals in the same manner as they apply to contract disputes before the Civilian Board." *Id.* § 847(d)(2)(B).

Second, that the amendments "expressly authorize[] contractors to appeal adverse decisions by Postal Service contracting officers to either the Court of Federal Claims or alternatively to the Postal Service Board of Contract Appeals and then to the Federal Circuit" (BIO 9) similarly has no effect on the question presented. Rather, such a technical change leaves Postal Service contractors with precisely the same options under the CDA that were available to them before the amendments – viz., go directly to the Court of Federal Claims or proceed to the agency board and then to the Federal Circuit – as well as with avenues of relief directly analogous to those that will be available after the amendments to other federal contractors. *See* 41 U.S.C. §§ 606, 607(g)(1), 609(a)(1).

4. The United States argues that the decision below is "correct" because the court of appeals "applied settled principles of statutory interpretation in determining that the CDA displaces the PRA's general sue-and-be-sued clause." BIO 4-

5. That argument ignores the petition's contention (at 12-13) that the text of the CDA indicates that it was merely intended to provide a non-exclusive avenue to federal court jurisdiction. Instead, the Solicitor General's argument rests primarily on the D.C. Circuit's statement in *A & S Council* that the CDA is "the paradigm of a 'precisely drawn, detailed statute' that preempts more general jurisdictional provisions," including a "general sue-and-be-sued clause." BIO 6. But that assertion simply re-states the question that petitioner has asked this Court to resolve.

In fact, the legislative history indicates that a primary purpose of the CDA was to expand direct access to the courts for government contractors. The first "key" issue discussed in the Senate Report accompanying the CDA[1] states that the Act "would restore the contractor its right to a day in court – a fully judicialized, totally independent forum – which historically has been the forum within which contract rights and duties have been adjudicated." S. Rep. No. 95-1118, at 11 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5235, 5245. Prior to the passage of the CDA, most contractors – although not Postal Service contractors, who could file suit in district court under the PRA, *see* 39 U.S.C. § 409(a) – "were caught in an irrational patchwork system that limited their access to court, failed to provide adequate due process protections, and often resulted in substantial delays." Clarence Kipps et al., *The Contract Disputes Act: Solid Foundation, Magnificent System*, 28 PUB. CONT. L.J. 585, 587 (1999) (article co-author was a co-sponsor of the House bill). In response to this ad hoc system, "Congress created the Commission on Government Procurement in 1969 to study the procurement process." 1978 U.S.C.C.A.N. at 5238. "Direct access to court was a cornerstone of the Commission's report," Kipps et al., 28

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[1] "The House Bill was passed in lieu of the Senate Bill after amending its language to contain the text of the Senate Bill." 1978 U.S.C.C.A.N. at 5235.

PUB. CONT. L.J. at 588, and the CDA was passed to implement these recommendations.

While the Solicitor General is correct that Congress, in enacting the CDA, opted to centralize this expanded access to courts in the Court of Claims, nothing in the legislative history reflects a desire to remove existing avenues to judicial review. Rather, the decision to vest jurisdiction in the Court of Claims rested primarily on a "sensitiv[ity] to the workload pressures of the district court" and a desire to avoid "burden[ing] the district courts with direct actions." 1978 U.S.C.C.A.N. at 5244. But this concern was about *additional* claims; nothing suggests that the *existing* claims were somehow burdensome. To the contrary, as noted *supra*, a primary catalyst for the enactment of the CDA was the inability of contractors to gain any access to courts. To infer from Congress's silence in the CDA an intent to remove all Postal Service contract disputes from the district courts just a few years after massively overhauling the Postal Service "to be run more like a business than its predecessor," *Franchise Tax Bd.*, 467 U.S. at 520, including adding the provision allowing the Postal Service "to sue and be sued" in the district courts, simply reads far too much into that silence.

And the exemption of the Tennessee Valley Authority from the CDA reflects nothing more than Congress's intent to keep TVA claims out of the Court of Federal Claims. As the Senate Report indicated, "the Court of Claims is specifically excluded from jurisdiction over the TVA and the committees do not believe that this authority should change." 1978 U.S.C.C.A.N. at 5244. At the time of the CDA's enactment, the Postal Service and other quasi-governmental agencies such as the Small Business Administration were – unlike the TVA – already amenable to suit for contract disputes in both the district courts and the Court of Claims. *See, e.g.*, *Butz Engineering Corp.* v. *United States*, 499 F.2d 619 (Ct. Cl. 1974) (in case considered after enactment of PRA but before enactment of CDA, Court of Claims has jurisdiction to hear

breach of contract claims against the Postal Service). Congress's silence on this issue indicates merely that it intended to allow contract suits against the Postal Service to proceed in both courts.

5. The Solicitor General's argument that petitioner's case is an "inappropriate" vehicle to address the question presented "because the facts petitioner alleges demonstrate that no contract existed in the first place" (BIO 9-10) falls short in several respects.

First, the Solicitor General does not contend that, if certiorari were granted, this Court would actually reach (much less need to reach) the contract formation issue in the first place. Rather, such an argument would be available to respondent on remand from this Court.

Second, the district court expressly rejected a similar claim by the United States, which contended in that court that petitioner's "breach of contract claim fails as a matter of law because the USPIS regulations authorizing the issuance of rewards prohibit the creation of contractual obligations based on the submission of information in response to a reward offer." Pet. App. 10a-11a. The district court explained that although 39 C.F.R. § 233.2(b) – which provides that "[r]ewards *will* be paid up to the amounts and under the conditions stated in Poster 296, Notice of Reward" (emphasis added), which in turn indicates that "[t]he amount of any reward *will* be based on the significance of services rendered, character of the offender, risks and hazards involved, time spent, and expenses incurred" (emphasis added) – "provides some discretion in the distribution of rewards, it does not provide the clear barrier to the formation of a contractual obligation relied upon by USPIS," Pet. App. 11a.

Third, and in any event, as Section 233.2(b) makes clear, the Solicitor General's contention that "USPIS's offer to reward 'up to $50,000' for information leading to an arrest cannot constitute an implied-in-fact contract" (BIO 10) is simply

erroneous.[2] Pursuant to the regulation, USPIS promised not simply to pay a reward of up to $50,000, but also to make a reward determination based on the factors listed. It is well-established that "an obligation under a contract is not illusory if the obligated party's discretion must be exercised with reasonableness or good faith." 17A AM. JUR. 2D *Contracts* § 130 (2006). Although, as the district court recognized, USPIS retains some discretion with regard to the amount of the reward, that discretion is clearly bounded by the regulation, and the Postal Service's obligation to make a determination regarding the appropriate reward is not optional. To be sure, if this Court were to grant certiorari, rule in petitioner's favor, and remand to the lower courts for consideration of petitioner's claim on the merits, USPIS may seek to prove that a reward of zero dollars in fact satisfies its contractual obligations. Such a dispute, however, is a factual one that is neither properly resolved on a motion to dismiss nor relevant to the question whether certiorari is warranted.

CONCLUSION

For the foregoing reasons, as well as the reasons outlined in the petition, certiorari should be granted.

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[2] Notably, the Solicitor General cites only one case (and petitioner's research has revealed no others) for the proposition that providing a maximum (but no minimum) reward constitutes an illusory promise. *See Cornejo-Ortega v. United States*, 61 Fed. Cl. 371, 375-76 (2004). Indeed, the court in *Cornejo-Ortega* in turn relied primarily on two patent cases holding that the words "up to" can include zero, and on general authority holding that illusory promises are not binding. *Id.* Even if the Court of Federal Claims were correct, however, the Solicitor General's reliance on it is unavailing because, as explained above, USPIS's discretion in paying rewards is – unlike that of the FBI and DEA in *Cornejo-Ortega* – limited, which goes to the heart of the illusory promise inquiry.

Respectfully submitted,

Mark D. Kelly
KLEMP & STANTON, P.L.L.P
400 East Exchange St.
St. Paul, MN 55101

Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Amy Howe
(Counsel of Record)
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl. NW
Washington, DC 20016
(202) 237-7543

Thomas C. Goldstein
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

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